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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-397

BONELLI CATTLE COMPANY, a California corporation; County of Mohave, a political subdivision of the State of Arizona,

Petitioners,

v.

THE STATE OF ARIZONA, THE STATE LAND DEPARTMENT, a department of the State of Arizona; ANDREW L. BETTWY, State Land Commissioner of the State of Arizona,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	3
Constitutional Provisions, Statutes and Ordinances Involved	5
Statement:	
History of the Case	9
History of the Colorado River	11
Summary of Argument:	
Forward	15
Question I	15
Question II	16
Question III	17
Question IV	17
Question V	17
Question VI	17
Argument:	
I. Whether the Ordinary High Water Mark and Bed of a Navigable River Is Established by and Includes all of the Area Below the Line Created by the Water During the Usual High Flow Stage of the River's Annual Cycle	18
II. Whether Changes in the Flow Pattern of a Navigable River Caused by the Construction of Dams and Rechannelization of the Stream Bed by the United States Changes or Alters the Ordinary High Water Mark for the Purpose of Changing or Altering the Ownership of the Exposed Lands Resulting from the Construction of Such Works	27

Page

III. Whether Federal or State Law Controls the Ownership of Land Gained or Lost by Accretion on Property Conveyed by the United States Prior to Statehood. 31

IV. Whether the Decisions of the Arizona Supreme Court Affect Title to Federal and Indian Lands as Well as Private Lands Bordering the Colorado River. 34

V. Whether the Latter Decision of the Arizona Supreme Court Dated April 13, 1972, Misconstrues or Misinterprets the Submerged Lands Act of Congress as a Grant by Congress to the States of Lands Formerly Beneath Navigable Waters Up to the Ordinary High Water Mark Without Recognizing that said Act Specifically Exempts from the Effect Thereof Any Lands to Which Title to the Beds of Such Streams Was Lawfully Patented or Conveyed by the United States or Any State to Any Person (43 U. S. C. 1301(f)). 38

VI. Whether the Respective Decisions of the Arizona Supreme Court Constitute a Taking of Property by the State of Arizona Without Compensation Having Been Made Therefor in Violation of the Fifth and Fourteenth Amendments to the Constitution of the United States and the Provisions of Article 2, Section 17, Arizona Constitution 40

Conclusion 50

CITATIONS

Cases	Pages
Arizona v. California, 283 U. S. 423, 75 L. Ed 1154, 51 S. Ct. 522 (1930)	11
Arizona v. Gunther & Shirley Company, 5 Ariz. App. 77, 423 P. 2d 352 (1967)	13
Beaver v. United States, 350 F. 2d 4 (1965), (cert. denied 383 U. S. 937, 86 S. Ct. 1067, 15 L. Ed 2d 854 1966)	28, 29
Borax, Ltd. v. Los Angeles, 296 U. S. 10, 80 L. Ed 9, 56 S. Ct. 23 (1935)	32
Hughes v. Washington, 389 U. S. 290, 19 L. Ed 2d 530, 88 S. Ct. 438 (1967)	25, 31, 32, 44
Kerby v. State ex rel. Frohmiller, 62 Ariz. 297, 157 P. 2d 698 (1945)	46
Morgan v. Colorado River Indian Tribe, 103 Ariz. 425, 443 P. 2d 421 (1968)	36, 37
Oklahoma v. Texas, 258 U. S. 574, 42 S. Ct. 406, 66 L. Ed 771 (1922)	20
Oklahoma v. Texas, 260 U. S. 606, 43 S. Ct. 221, 67 L. Ed 428 (1923)	20
Philadelphia Co. v. Stimson, 223 U. S. 605, 32 S. Ct. 340, 56 L. Ed. 570 (1912)	29
Pollard v. Hagan, 3 How. 212, 11 L. Ed 565 (1845)	16, 19, 25, 29, 37, 38, 39
Shively v. Bowlby, 152 U. S. 1, 14 S. Ct. 548, 38 L. Ed 331 (1894)	19
State v. Bonelli, 11 Ariz. App. 412, 464 P. 2d 999 (1970)	2, 3, 24, 29
State v. Bonelli, 107 Ariz. 465, 489 P. 2d 699 (1971)	2, 20, 24, 41, 42, 45
State v. Bonelli, 108 Ariz. 258, 495 P. 2d 1312 (1972)	2, 10, 27, 42

Pages

State v. Gill, 259 Ala. 177, 66 So. 2d 141 (1953) 29
State v. Martin, 59 Ariz. 438, 130 P. 2d 48 (1942) 49
Stone v. Arizona Highway Commission, 93 Ariz. 384, 381 P. 2d 107 (1963; rehearing denied) 48

United States v. Arizona, 295 U. S. 174, 55 S.Ct. 666, 79 L. Ed. 1371 (1935) 20
United States v. Claridge, 279 F. Supp. 87 (1967) 3, 18, 21, 26, 31, 32
United States v. Claridge, (1969) 416 F. 2d 933 (cert. denied 3-2-70, 397 U. S. 961, 25 L. Ed 2d 253, 90 S. Ct. 994) 3, 10, 18, 23, 31
United States v. Georgia Pacific Co., 421 F. 2d 92 (1970) 48

CONSTITUTIONS, ORDINANCES AND STATUTES

Arizona Constitution

Article 1, Section 1 12
Article 2, Section 4 .....18, 43
Article 2, Section 17 .....4, 5, 7, 17, 40
Article 20, Section 4 .....5, 8, 17, 36

Arizona Enabling Act

Section 20, Second, Act of Congress of June 20, 1910, c. 310, 36 U. S. Stat. 557, 568-579 .....5, 8, 17, 36

United States Constitution

Fifth Amendment 4, 5, 7, 17, 40, 43
Fourteenth Amendment 4, 5, 7, 17, 40, 43

Act of July 27, 1866, 14 Stat. 292 12
Act of June 17, 1902, 32 Stat. 388 ..... 5, 35

Pages

Submerged Lands Act

C. 65, Title I, § 2, 67 Stat. 29 et seq. 43 U. S. C. § 1301 et seq. 4, 5, 16, 17, 25, 29, 37, 38, 39, 52

43 U. S. C. § 1301(a) 5

43 U. S. C. § 1301(f) 4, 6, 39

43 U. S. C. § 1313 (a) 6, 38

43 U. S. C. § 1313(b) 6, 38

Boulder Canyon Project Act

C. 42 § 1, 45 Stat. 1057, 43 U.S.C. § 617 et seq—3, 5, 7, 16, 28

28 U. S. C. § 1257(3) 3

MISCELLANEOUS

Arizona Law Review, Vol. 14, No. 2, published by the College of Law of the University of Arizona, reprint of an Article by Robert E. Lundquist entitled: Artificial Additions to Riparian Land: Extending the Doctrine of Accretion - Petition Appendix I 15, 29, 52

Attorney General of Arizona - Opinions and Reports Opinion of 1935 47

Reports of 1963, 1964 and 1967, Exhibits B-1, B-2, B-3 to Motion for rehearing 47

Colorado River Boundary Compact between Arizona and Nevada approved by Congress June 16, 1961, Public Law 87-50, 87th Congress, 1st Session, 75 Stat. 93 14

Encyclopedia Britannica, Vol. 19, 1939 Ed. p. 902 14

Executive Order of May 15, 1976 36

Pages

Lower Colorado River Land Use Plan - a Report of the Lower Colorado River Land Use Advisory Committee - United States Department of the Interior, January 1964 ..... 11, 13, 33, 35, 41, 42

Memorandum of Law Points and Authorities Respecting the Rights of Arizona in the Colorado River, submitted to the Honorable George W. P. Hunt, Governor of Arizona, by Samuel White, Attorney at Law, dated September 8, 1925 46

Ten Rivers in America's Future, Basins of the West, The Colorado, 1950 Vol. 2, p. 355-462, Report of the President's Water Resources Policy Commission..... 13

Withdrawal Order of January 13, 1903 ..... 5, 35

World Almanac, 1972 Ed., Memorable Dates 1534-1638, p. 796, published by Newspaper Enterprise Association, Inc. 11

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Respondents.

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Brief for the Petitioners

OPINIONS BELOW

The trial court's judgment quieting title against the State of Arizona and its State Land Department to the lands involved in this litigation situate along the Colorado River on the Arizona side of the river in Bonelli was entered by the Mohave County Superior Court of Arizona July 17, 1967, and certified copies thereof were recorded July 28, 1967, in Book 110 of Dockets, pages 228-232, records of

Mohave County, Arizona, and August 21, 1967, Instrument No. 656353, Official Record Book No. 817, records of Clark County, Nevada (App. 19).

The decision of the Court of Appeals of Arizona, Division 1, Department A, decided February 16, 1970, on an appeal by the State of Arizona and its State Land Department from the Mohave County Superior Court judgment affirmed the judgment of the trial court (App. 25) and is reported at 11 Ariz. App. 412, 464 P. 2d 999.

The Supreme Court of Arizona rendered two decisions. The first decision of October 4, 1971, was on review on petition of the State of Arizona of the aforesaid decision of the Court of Appeals of Arizona which reversed the judgment of the trial court and vacated the opinion of the Court of Appeals (Pet. App. A) and is reported at 107 Ariz. 465, 489 P. 2d 699. Upon timely motion for rehearing by Bonelli, in which proceeding several amici curiae briefs were filed including the County of Mohave supporting the motion for rehearing, the Supreme Court of Arizona on April 13, 1972, denied the motion for rehearing (App. 60) and supplemented its previous decision (Pet. App. B) reported at 108 Ariz. 258, 495 P. 2d 1312.

In both Supreme Court decisions Justice Lockwood dissented and filed an opinion in both decisions (Pet. App. A and B).

JURISDICTION

The final decision of the Arizona Supreme Court was filed April 13, 1972, on which date the Arizona Supreme Court denied Bonelli's motion for rehearing (App. 60). On joint application of petitioners and respondents, Mr. Justice Douglas by order dated June (*sic*) 12, 1972, extended the time for filing a petition for a writ of certiorari to and including September 9, 1972. The petition was filed September 8, 1972, and the petition for writ of certiorari was

granted January 22, 1973 (App. 65) after the Court had requested the Solicitor General to express the view of the United States in this case. In the Memorandum for the United States as Amicus Curiae the Solicitor General recommended the Court deny certiorari.

The jurisdiction of this Court is invoked under 28 U. S. C. (1257 (3)).

QUESTIONS PRESENTED

The questions presented herein are a result of a direct conflict of the decisions of the Arizona Supreme Court (Pet. App. A and B) with the decision in *United States v. Claridge,* reported in 279 F. Supp. 87, affirmed by the United States Court of Appeals for the Ninth Circuit reported in 416 F. 2d 933 (cert. denied March 2, 1970, 397 U. S. 961, 25 L. Ed. 2d 253, 90 S. Ct. 994) (Pet. App. C). These decisions involved ownership and changes of ownership of lands along the Colorado River by virtue of its past natural movements and later changes of the channel as a result of the construction of Hoover Dam and the rechannelization of the Colorado River by the United States under the Boulder Canyon Project Act passed by Congress in 1928 (43 U. S. C. 617 et seq.). While the *Claridge* decision did not involve an area where rechannelization had occurred, the difference between the high water mark and the bed of the Colorado River as fixed by *Claridge* and as fixed by the Arizona Supreme Court decisions as they affect the Bonelli land is clearly shown on the diagram attached to the petition (Pet. App. D) and for convenience of the Court made a part of this brief (page 54). This is a composite of Judge Cameron's sketches appearing in the Court of Appeals decision (pp. 1000, 1001, 1002, 464 P. 2d 999; App. 29, 30, 31). Reference to this plat hereafter for brevity will be to the "composite plat".

1. Whether the ordinary high water mark and bed of a navigable river is established by and includes all of the area below the line created by the water during the usual high flow stage of the river's annual cycle.

2. Whether changes in the flow pattern of a navigable river caused by the construction of dams and rechannelization of the stream bed by the United States changes or alters the ordinary high water mark for purposes of changing or altering the ownership of the exposed lands resulting from the construction of such works.

3. Whether Federal or State law controls the ownership of land gained or lost by accretion on property conveyed by the United States prior to statehood.

4. Whether the decisions of the Arizona Supreme Court affect title to Federal and Indian lands as well as private lands bordering the Colorado River.

5. Whether the latter decision of the Arizona Supreme Court dated April 13, 1972, misconstrues or misinterprets the Submerged Lands Act of Congress as a grant by Congress to the States of lands formerly beneath navigable waters up to the ordinary high water mark without recognizing that said Act specifically exempts from the effect thereof any lands to which title to the beds of such streams was lawfully patented or conveyed by the United States or any State to any person (43 U. S. C. 1301 (f)).

6. Whether the respective decisions of the Arizona Supreme Court constitute a taking of property by the State of Arizona without compensation having been made therefor in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States and the provisions of Article 2, Section 17, Arizona Constitution.

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

The Submerged Lands Act of Congress enacted in 1953, 43 U. S. C. 1301 et seq.

The Act of Congress of June 17, 1902, 32 Stat. 388, and the unpublished Reclamation Withdrawal Order of January 13, 1903, issued pursuant thereto, a certified copy of the entire Order having been filed separately with the Clerk and pertinent parts thereof being set forth on page 34 of the Petition.

The Boulder Canyon Project Act enacted in 1928, 43 U. S. C. 617 et seq.

The constitutional and ordinance provisions involved are:

The Fifth and Fourteenth Amendments to the Constitution of the United States.

The Enabling Act of Arizona, Section 20, Second.

Article 2, § 17, Arizona Constitution, and Section Fourth, Article XX, of the Arizona Constitution.

The following are the pertinent parts of the Submerged Lands Act of Congress enacted in 1953, C. 65, Title I, § 2, 67 Stat. 29, now appears as 43 U. S. C. Section 1301 and provides in pertinent part:

"§ 1301. *Definitions*

"When used in this chapter—

"(a) The term 'lands beneath navigable waters' means —

"(1) all lands within the boundaries of each of the respective States which are covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, or acquired sovereignty over such lands and waters thereafter, up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction;

• • • • •

"(f) The term 'lands beneath navigable waters' does not include the beds of streams in lands now or heretofore constituting a part of the public lands of the United States if such streams were not meandered in connection with the public survey of such lands under the laws of the United States and if the title to the beds of such streams was lawfully patented or conveyed by the United States or any State to any person;".

C. 65, Title II, § 3, 67 Stat. 30, now appears as 43 U. S. C. Section 1311 and provides in pertinent part:

"§ 1311. *Rights of the States—Confirmation and establishment of title and ownership of lands and resources; management, administration, leasing, development, and use*

"(a) It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof;".

C. 65, Title II, § 5, 67 Stat. 32, now appears as 43 U. S. C. Section 1313 and provides in pertinent part:

"§ 1313. *Exceptions from confirmation and establishment of States' title, power and rights*

"There is expected from the operation of section 1311 of this title—

"(a) * * * all lands expressly retained by or ceded to the United States when the State entered the Union * * *".

The Boulder Canyon Project Act was enacted by Congress December 21, 1928. C. 42 § 1, 45 Stat. 1057, now appears as 43 U. S. C. Section 617 and the pertinent part provides:

> "§ 617. *Colorado River Basin; protection and development; dam, reservoir, and incidental works; water, water power, and electrical energy; eminent domain*
>
> "For the purpose of controlling the floods, improving navigation and regulating the flow of the Colorado River, providing the flow of the Colorado River, providing for storage and for delivery of the stored waters thereof for reclamation of public lands and other beneficial uses exclusively within the United States * * * the Secretary of the Interior * * * is hereby authorized to construct, operate, and maintain a dam and incidental works in the main stream of the Colorado River at Black Canyon or Boulder Canyon adequate to create a storage reservoir * * * and appurtenant structures located entirely within the United States connecting the Laguna Dam, or other suitable diversion dam * * *".

The pertinent parts of the Fifth and Fourteenth Amendments to the Constitution of the United States are:

> "Amendment V. No person shall be * * * deprived of * * * property, without due process of law; nor shall private property be taken for public use, without just compensation."
>
> "Amendment XIV. Section 1. * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of * * * property, without due process of law; * * *."

The following is the pertinent part of Article 2, Section 17, Constitution of Arizona:

> "Section 17. * * * No private property shall be taken or damaged for public or private use without just

compensation having first been made, or paid into court for the owner * * * ."

The pertinent part of Section 20, Second, of the Act of June 20, 1910, c. 310, 36 U. S. Stat. 557, 568-579, which enabled the people of the Territory of Arizona to form a constitution and state government is:

> "Second. That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States; * * * ".

and the pertinent part of the Ordinance provided by the Arizona Constitution, Article XX, Section Fourth, is:

> "Fourth. *Public lands; Indian lands*
>
> "Fourth. The people inhabiting this State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that, until the title of such Indian or Indian tribes shall have been extinguished, the same shall be, and remain, subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States."

STATEMENT

History of the Case

On April 16, 1962, Bonelli Cattle Company filed an action in the Superior Court of Mohave County, Arizona, against the State of Arizona, its State Land Department and the State Land Commissioner to quiet title to the lands involved in this litigation situate along the Colorado River on the Arizona side of the river (App. 3). The action was submitted to the court on an agreed statement of facts (App. 6). On July 17, 1967, the court entered its judgment and decree quieting title to the subject lands in favor of the plaintiff Bonelli and against the defendants the State of Arizona, its State Land Department and State Land Commissioner (App. 19). From this decision the defendants appealed to the Arizona Supreme Court (App. 23), which court denied the direct appeal to it and ordered the appeal transferred to the Court of Appeals of Arizona, Division 1 (App. 24). The Court of Appeals on February 16, 1970, affirmed the judgment and decree of the Superior Court (App. 25). Upon application of defendants the Arizona Supreme Court granted review and by its decisions of October 4, 1971, and April 13, 1972, reversed the judgment of the trial court and vacated the decision of the Court of Appeals (Pet. App. A and B).

By said decisions the Arizona Supreme Court in effect held that the State of Arizona had acquired title to the Bonelli land by virtue of the fact that the Colorado River had moved in an eastward direction in a slow and imperceptible manner during which time the State of Arizona acquired title to the land and that the channelization of the Colorado River confining its flow to a part of the old bed did not cause a loss of the State's ownership.

In its first decision (Pet. App. A), the Arizona Supreme Court established the State's ownership to the land once covered by the Colorado River to the *high water mark,* which covered all of the east half of the Bonelli land except a small portion of the southeast corner thereof similar to a line established by Claridge (Pet. App. C), *supra.*

Upon timely petition for rehearing by Bonelli and after extensive briefs had been filed by Bonelli, the Attorney General of Arizona and eight amici curiae (App. 58), including the County Attorney of Mohave County although he is not named in the reported decision (Pet. App. B), the Supreme Court of Arizona on April 13, 1972, denied Bonelli's petition for rehearing (App. 60) and by supplementing its first decision (Pet. App. B) once again held that the State's title extended to the *high water mark,* but modified its first decision by holding that the State's title extended to the *high water mark* as it existed prior to the closing of the gates at Hoover Dam in 1938 (*sic*), although the gates were actually closed in 1935 (see Claridge, 279 F. Supp. 90).

This decision specifically refused to follow the rule in *United States v. Claridge,* supra (Pet. App. C), which establishes a different *"high water mark",* the Arizona Supreme Court stating: "It should be made clear that Arizona's title as against private persons is in no way controlled by the opinion in United States v. Claridge" (495 P. 2d 1314; Pet. App. B, p. 6b).

The conflict between the two decisions of the Arizona Supreme Court and the *Claridge* decision as to what constitutes the "high water mark" is shown on the "composite plat" (p. 54 this brief). It will be noted that the line established by the Arizona Supreme Court completely wipes out all of Bonelli's title and in addition extends the state ownership in the immediate vicinity of the Bonelli land

to portions of Section 32 (possibly state land), portions of Section 35 (fee land), Township 20 North, Range 22 West, and Sections 2 and 10 (public land administered by the Bureau of Land Management) and Section 11 (fee land granted to Santa Fe by the same patent from the United States that covered the Bonelli land), Township 19 North, Range 22 West, which lands lie to the north, east and south of the Bonelli lands and over a large area of the Fort Mohave Indian Reservation to the south in unsurveyed Township 19 North, Range 22 West. (See Davis Dam Quadrangle, Exhibit J and 1960 Mosaic Aerial Survey Photo, Exhibit D to the agreed statement of facts (App. 6) not a part of the appendix but a part of the record before this Court; "composite plat", p. 54 this brief; The Lower Colorado River Land Use Plan—a Report of the Lower Colorado River Land Use Advisory Committee—United States Department of the Interior, January 1964, on file with the Clerk of this Court and maps enclosed therein).

History of the Colorado River

The Colorado River was discovered in 1540 by Francisco Coronado. This was one year before the Mississippi River was discovered by Hernando de Soto (1972 World Almanac, Memorable Dates 1534-1638, p. 796, published by Newspaper Enterprise Association, Inc.).

The Colorado River was declared to be a navigable stream by this Court in *Arizona v. California*, 283 U. S. 423, 75 L. Ed. 1154, 51 S. Ct. 522 (1930). The Colorado River re-emerges from Lake Mead through Hoover Dam and winds its way over 500 miles to the Gulf of California, forming the western boundary of the State of Arizona. In certain areas along the River, the boundary between Arizona and the States of California and Nevada is set by

agreement; thus the middle thread of the River may or may not coincide with the actual boundary. In Arizona the River's course is bordered by the Counties of Mohave and Yuma.

The Bonelli land was originally surveyed in 1905 and 1906 and the official plat of survey was approved by the Surveyor General of the United States Department of the Interior June 29, 1906 (App. 15). At that time the Colorado River was entirely to the west of the Bonelli land and did not in any way encroach upon said land. Pursuant to the Act of Congress approved July 27, 1866, 14 Stat. 292, the subject land together with other lands was conveyed in accordance with the official plat of survey by patent issued by the United States on November 5, 1910, to The Atlantic and Pacific Railroad Company, predecessor in interest to Santa Fe Pacific Railroad Company (App. 16).

The exhibits attached to the agreed statement of facts (App. 6, not a part of the record as they could not be reproduced in printing) show the flood-plain area of the Colorado River between the 500-foot contour line on the Arizona side and the 500-foot contour line on the Nevada side (particular reference being made to the 1950 Davis Dam Quadrangle, Exhibit J). This area shown on the Quadrangle covers a distance of some four to five miles. The present channel through Section 3 (the Bonelli land) is approximately one mile to a mile and a half from the old Arizona-Nevada line which, according to maps at the time of the adoption of the Arizona Constitution in 1910 was the center of the Colorado River (see Sec. 1, Art. I, Constitution of Arizona).

History shows that since the original survey, the conveyance of the Bonelli land by the United States and the admission of Arizona to the Union on February 14, 1912,

the movement of the Colorado River has been from west to east meandering aimlessly and listlessly over the period of years from a distance of from some three to five miles between the 500-foot contour lines and has in the past covered much, if not all, of the Bonelli land (Davis Dam Quadrangle, Exhibit J). From the evidence presented to the trial court no one could nor could evidence pin-point at any one time during the meanderings of the River where the main stream of the Colorado River flowed until the active flow of the River was rechanneled in 1959 by the Bureau of Reclamation in the area of the Bonelli land. This rechannelization restricted the main flow of the River to occupy only a portion of the Bonelli land ("composite plat", p. 54 this brief; and "1962 dependent resurvey", *infra*).

But not only did the River meander from west to east. History also shows that prior to the closure of Hoover Dam in 1935 uncontrolled water levels fluctuated tremendously from year to year; several flood conditions prevailed nearly every year and water shortages occurred in some years (Lower Colorado River Land Use Plan, *supra*). The velocity of the water and the amount of silt that the Colorado River has carried and the great floods that have raged down its course has made it anything but a river of slow and imperceptible movement (Ten Rivers in America's Future, Basins of the West, The Colorado, 1950 Vol. 2, p. 355-462). As described by the Arizona Court of Appeals in *Arizona v. Gunther & Shirley Company*, 5 Ariz. App. 77, 423 P. 2d 352 (1967) at 353:

> "The Colorado, rushing as it does down from the mountains, scours its river bed through the Grand Canyon of the Colorado, and is one of the major silt-carrying rivers of the world.
>
> • • • • • •

"Before the River was controlled by the Dams, the Colorado normally flowed at the rate of 15,000 to 20,000 cubic feet per second past the Yuma Narrows, though at flood stage over 200,000 cubic feet per second has been recorded."

About the time the township was surveyed in 1905, it is a well-known historical fact that the Colorado River broke its banks and moved westward forming the Salton Sea (Encyclopedia Britannica, Vol. 19, 1939 Ed. p. 902). It is also a well-known fact that at one time the Colorado River in the Blythe, California, area again broke its banks, flooded westward and encircled Blythe making it a part of Arizona.

This continuous change in the channel of the Colorado River was of grave concern to California, Nevada and Arizona and for many years before the adoption of the Interstate Compacts defining the boundaries between California, Nevada and Arizona raised serious jurisdiction questions, both civil and criminal.

As previously stated, when Arizona was admitted to the Union, the boundary between Arizona and Nevada lay a considerable distance west of the Bonelli land ("composite plat", p. 54 this brief). By virtue of the Colorado River Boundary Compact between Arizona and Nevada approved by Congress June 16, 1961, Public Law 87-50, 87th Congress, 1st Session, 75 Stat. 93, the boundary now lies down the center of the Colorado River as rechanneled by the Bureau of Reclamation in 1959, and because of the artificially created active flow channel of the Colorado River on both the east and west sides of the channel (or on the Arizona and Nevada sides, respectively), part of the Bonelli land as originally conveyed by the Santa Fe Railroad now lies in Nevada on the west side and in Arizona on the east side ("composite plat", p. 54 this brief).

In December of 1961 the Bureau of Land Management caused to be made a limited dependent resurvey of Sections 2 and 10, Township 19 North, Range 22 West, the plat of which resurvey became official when approved by the Bureau of Land Management on October 12, 1962. This plat is not a part of the appendix but is a part of the record before the Court as Exhibit G to the agreed statement of facts and nine copies of the full scale plat for the convenience of the members of the Court will be filed with the Clerk separately at the time this brief is filed. A reduced copy of this plat is made a part of this brief (p. 55) and hereafter for brevity reference to this plat will be to "1962 dependent resurvey".

SUMMARY OF ARGUMENT

Foreword

In presenting these vital questions to the Court we are fortunate in having an excellent up-to-date article not only covering the general subject matter, but specifically covering the Arizona Supreme Court's decisions in *Bonelli* and the Federal Court's decisions in *Claridge*. This is the article written by Robert E. Lundquist for the Arizona Law Review, No. 2, Volume 14, entitled *Artificial Additions to Riparian Land: Extending the Doctrine of Accretion*, which article was filed with the petition herein as Appendix I. We feel that the burdens on the Court in deciding this important matter will be considerably lessened by this excellent article even though perhaps the Court and respective counsel may not fully agree or concur with the article or the conclusions made therein.

I

The fundamental purposes of the grant to the states of the beds of navigable streams as stated by this Court

in *Pollard v. Hagan, infra,* and subsequent decisions, confirmed in 1953 by Congress in the enactment of the Submerged Lands Act, was to provide in the sovereign states the right to protect to the public access to navigable streams to use for highways of navigation, commerce, and related activities. This grant was never intended to extend over large areas of exposed land previously lost by riparian owners as the main thread of the stream moved, particularly when the exposed land was caused by works done by the Federal government to improve navigation and other legitimate purposes. The sovereign states own the lands beneath the navigable stream as a servitude only and when the river is gone or destroyed either through natural or man-made causes the reason for the servitude is gone and the limitation of the servitude, if any remains, is to that channel remaining navigable, namely the main thread of the navigable stream.

II

When the flow pattern or the location of the main channel of a navigable stream is changed by the Federal government in the exercise of its power under the commerce clause, and specifically under statutes such as the Boulder Canyon Act, for legitimate purposes thereunder and is not done for the purpose of changing land titles, the State's ownership of the bed of such navigable stream is limited to the bed of the stream after such works are completed, namely the main channel; and title to the exposed dry beds resulting from such channelization reverts back to the original owner, be it an individual, the United States, an Indian tribe or the State itself.

III

Federal law, not State law, controls the ownership of land gained or lost by accretion title to which land was conveyed prior to statehood by the United States.

IV

The rule adopted by the Arizona Supreme Court as to ownership of exposed land along the Colorado River after channelization affecting fee lands the source of title of which came from the United States would apply as well under the grant at statehood of title to the beds of navigable streams to not only Indian lands but any and all other types of land owned by the United States notwithstanding any provisions of the Enabling Act or Constitution of Arizona or Executive Withdrawal Orders withdrawing lands along the Colorado River to the contrary.

V

The Submerged Lands Act granted no new rights or grants of land to the State but merely confirmed as a quit-claim all previous rights in navigable rivers; furthermore, the Submerged Lands Act specifically exempted from the provisions thereof persons who held legal title to submerged lands obtained from the United States prior to statehood.

VI

The decisions of the Arizona Supreme Court constitute a taking of the Bonelli land without compensation in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States and Article 2, Section 17, of the Arizona Constitution and, as applied to other fee lands along the Colorado River, constitute a taking of these lands without due process of law prohibited by the Fourteenth Amendment to the Constitution of the

United States and Article 2, Section 4, of the Arizona Constitution, regardless of whether the taking is attempted by judicial fiat, legislation or a taking by the Executive Department. The doctrine of sovereign estoppel should be invoked for such taking which is occurring almost fifty years after the executive and legislative departments of the State government have been continuously advised from time to time over the fifty-year period of the State's possible ownership of lands bordering a navigable stream but which departments failed to act in asserting the State's ownership and the ownership was not asserted until the lands were highly developed and improved, and then the ownership was asserted only by judicial fiat retroactively applied by the judicial department of the State government.

ARGUMENT

I. Whether the Ordinary High Water Mark and Bed of a Navigable River Is Established by and Includes all of the Area Below the Line Created by the Water During the Usual High Flow Stage of the River's Annual Cycle.

In both of its decisions the Arizona Supreme Court ignores decisions of this Court to the contrary, particularly the decisions of the United States District Court for Arizona and the affirming decision of the 9th Circuit Court of Appeals in *Claridge* (279 F. Supp. 87 (1967); 416 F. 2d 933 (1969) and holds Arizona's ownership extends to the high water mark as it existed during time of high seasonal floods prior to the construction of Hoover Dam and the closing of its gates in 1935. In other words, this line as defined by the Arizona Supreme Court extends over and upon, in this immediate area, Sections 32 and 35, Township 20 North, Range 22 West; Sections 2, 10 and 11, Township 19 North, Range 22 West, and over a large area of the Fort Mohave Indian Reservation to the south in unsur-

veyed Township 19 North, Range 22 West (see Davis Dam Quadrangle, Exhibit J, and 1960 Mosaic Aerial Photo, Exhibit D, *supra*).

Justice Struckmeyer, speaking for the majority court, concludes in the supplemental opinion:

> "The high water mark, therefore, may be defined as to the line to which high water ordinarily reaches, and is not the line reached by the water in unusual floods. It is that line below which the soil is unfit for vegetation or agricultural purposes." (495 P. 2d 1314, 1315.)

This line as fixed by the Arizona Supreme Court is shown on the "composite plat", p. 54 this brief.

Previous decisions of this Court have held to the contrary. In the early Alabama case of *Shively v. Bowlby*, 152 U. S. 1, 14 S. Ct. 548, 38 L. Ed 331 (1894), which shortly followed *Pollard v. Hagan*, 3 How. 212, 11 L. Ed 565 (1845), this Court again stated the rule of state's ownership to be:

> "By the common law, both the title and the dominion of the sea, and of rivers and arms of the sea, where the tide ebbs and flows, and of all the lands below high-water mark, within the jurisdiction of the crown of England, are in the king. Such waters, and the lands which they cover, either at all times, or at least when the tide is in, are incapable of ordinary and private occupation, cultivation and improvement; and their natural and primary uses are public in their nature, for highways of navigation and commerce, domestic and foreign, and for the purpose of fishing by all the king's subjects. Therefore the title, jus privatum, in such lands, as of waste and unoccupied lands, belongs to the king, as the sovereign; and the dominion thereof, jus publicum, is vested in him, as the representative of the nation and for the public benefit." (pps. 551, 552, 14 S. Ct.)

Later in the case of *Oklahoma v. Texas,* 258 U. S. 574, 42 S. Ct. 406, 66 L. Ed 771 (1922) at 779 this Court held that when the term "middle of the main channel" and "mid-channel" was used when applied to navigable streams, such terms usually referred to the thread of the navigable current; and, *if there be several,* to the thread of the one best suited and ordinarily used for navigation.

In the subsequent case of *Oklahoma v. Texas,* 260 U. S. 606, 43 S. Ct. 221, 67 L. Ed. 428 (1923) this Court defines the boundary line on page 431:

> "This court, upon much consideration, held that the boundary was not at the line of ordinary low water, but along the waterwashed bank or elevation which bounds the river bed and confines the water within definite outer limits, save in the exceptional instances when it is so far at flood that it overflows its restraining banks and spreads over adjacent lands. * * *"

and further states on page 432:

> "It neither takes in over-flowed land beyond the bank, nor includes swamps or low grounds liable to be overflowed, but reclaimable for meadows or agriculture, or which, being too low for reclamation, though not always covered with water, may be used for cattle to range upon, as natural or uninclosed pasture."

This test is met by Justice Lockwood in her dissenting opinion in *Bonelli* where she states at page 706, 489 P. 2d, as a fact that the lands involved in the Bonelli litigation consist of agricultural developments bordering the Colorado River and, as stated by petitioner Mohave County, involves highly developed subdivision land along the Colorado River in Mohave County.

Later this Court in *United States v. Arizona,* 295 U. S. 174, 55 S. Ct. 666, 79 L. Ed 1371 (1935), which involved the right of the Federal government to construct Parker

Dam on the Colorado River states on page 1375 (referring to the proposed dam):

> "Its ends rest on public lands of the United States in Arizona and California."

On page 1377 the Court defines the ownership of Arizona in and to the bed and stream of the Colorado River as follows:

> "Arizona owns the part of the river bed that is *east of the thread of the stream.*" (Emphasis supplied.)

and further continues by subjecting this title to the paramount right of the United States to construct works on a navigable stream under the commerce clause stating that under that clause Congress has power to cause to be built a dam across the river in aid of navigation. If Parker Dam had been built on the Bonelli land and if the Arizona Supreme Court decisions in *Bonelli* had been in effect at the time of the construction of Parker Dam, Parker Dam would have been at the point of the Bonelli land over a mile wide from the center of the stream as now channelized for the reason that the dam's ends could not have rested upon public lands of the United States, at least on the Arizona side, without extending over a mile from the present channelized stream bed to the eastern boundary of Arizona's ownership in Section 2. Even under the *Claridge* decision (as hereinafter discussed) from the present channelized channel the dam would have been constructed over one-half a mile in length from the center of the stream.

In the trial court's decision in *Claridge*, Judge Craig briefly states the history of the Colorado River as follows:

> "Historically and prehistorically, the Colorado River has been at its peak flow, a turbulent and violent river, carrying enormous quantities of water, and with the water, great quantities of silt and alluvion. Over the

ages the deposit of the silt and alluvion by the river has resulted in the construction of the alluvial plain which constitutes the floor of the Valley. Since 1874, when attempts to measure the seasonal flow of the river and surveys were undertaken to establish its location, the meanderings of the river have been generally confined to the easterly side of the Valley, along the Arizona side or bluff." (279 F. Supp. 87 at 89.)

and holds that the land in question before him for decision was involved in one of the reclamation withdrawal orders along the Colorado River unless it lies within the bed of the river between the easterly ordinary high water mark and the thread of the river to the west.

In rejecting Arizona's claim to the ownership of the high water mark during high flood times to cover the entire flood plain, Judge Craig made some very pertinent findings of fact, namely:

"2. The present ordinary high water mark of the river exists by virtue of the controlled flow of the river through Hoover Dam and other dams upstream from the lands in question.

"3. The lands in question are located to the east of the present ordinary high water mark of the Colorado River.

• • • • •

"5. The present ordinary high water mark of the Colorado River so far as it relates to the lands in question *is within the existing banks of the river,* the easterly such bank lying to the west of the most westerly limits of the land in question.

"6. No part of the lands in question lie within the bed of the Colorado River *from the thread of the river* to its easterly bank, or otherwise." (279 F. Supp. 87 at 90; emphasis supplied.)

and concludes on page 91 as a matter of law:

> "1. The ordinary high water mark of a river is a natural physical characteristic placed upon the lands by the action of the river. It is placed there, as the name implies, from the ordinary flow of the river and *does not extend to the peak flow or flood stage so as to include overflow on the flood plain,* nor is it confined to the lowest stages of the river flow.
>
> "2. *The ordinary high water mark of the Colorado River* at the location in question *is within the existing banks of the river to the west of the lands in question, regardless of the activity by the United States in constructing certain works within the river to confine and improve the channel, which work has been undertaken within the purview of the Boulder Canyon Project Act.* 43 U. S. C. ¶ 617 et seq." (Emphasis supplied.)

In affirming Judge Craig in *Claridge,* the Ninth Circuit Court of Appeals holds on page 934 (416 F. 2d):

> "(A)ppellants' theory is founded *on the mistaken assumption* that the annual spring floods of the river (suffered prior to the advent of Hoover Dam), *which covered the valley from bluff to bluff, constituted its 'ordinary high water' and that the valley, from bluff to bluff, thus constituted the bed of the river.* By eliminating these floods, appellants contend, *the Hoover Dam caused an avulsive change in the flow of the river* so that the United States as riparian owner did not take title to the flood plain." (Emphasis supplied.)

and concluded that appellants' definition of "ordinary high water mark" *is unsound,* approving the statement made by Judge Craig under "2" above. It must be remembered the appellant urging this theory was the State of Arizona, whose petition for certiorari was denied by this Court (397 U. S. 961, 90 S. Ct. 994, 25 L. Ed 2d 253, March 2, 1970).

Judge Cameron in the *Bonelli* Arizona Court of Appeals decision also refused to follow Arizona's contention, pointing out that Arizona does recognize riparian rights as far as land title is concerned and one of these important rights is access to the water, and to allow Arizona to retain title to the intervening property would allow Arizona to terminate this very valuable right. Judge Cameron concludes that Arizona could not claim title to the area between the Colorado River and the Bonelli land after rechanneling. In other words, Arizona's ownership was limited to the east bank of the manmade channel. (464 P. 2d 1005, 1006; App. 38, 39.)

Justice Lockwood in her dissent also recognizes riparian ownership in the following language appearing on page 706 et seq., 489 P. 2d:

> "Owners of land abutting the river owned only to the high water mark, under the common law. As to their rights upon a change in the river's banks, the common law rule with regard to accretion and reliction was not necessarily in conflict with Arizona law. The nature of the title to the riverbed so acquired, however, is another matter. As stated in State v. R. E. Janes Gravel Co., 175 S.W.2d 739 (Tex. Civ. App. 1943; reversed on other grounds in Manfrais v. State, 142 Tex. 559, 180 S.W.2d 144 (1944)), "the title to a riparian owner is 'a base fee, determinable upon the occupancy of his soil by the river,' and that the title of the State to the riverbed is likewise a 'base or qualified' fee, 'determinable in favor of the riparians upon the abandonment of the bed by the river.' 175 S.W.2d at 741.
>
> "This holding is entirely consistent with the provision in our Constitution that no private property should be taken or damaged for public or private use without just compensation having been first made. Article 2, § 17, Arizona Constitution. The state properly has a governmental interest in the control of the

navigable river, and therefore in the land beneath it, so long as the river covers the land of a riparian proprietor. However, it is when the river is withdrawn from land originally owned by the riparian proprietor that governmental interest ceases to exist. It is more consistent with Article 2, § 17 of our Constitution that the riparian proprietor's property right, hitherto subjected to the qualified fee of the state by the accretive movement of the river, should be completely restored to him; otherwise there is a taking by the state of private property for public use without just compensation. To permit the state to retain title to the property under such circumstances would controvert the provision of the Constitution.

"To hold, as I believe we should, that the state's qualified title is terminated, and the riparian proprietor's title is released from its subservience, is in harmony with and is not repugnant to or inconsistent with the provisions of Article 2, § 17, supra, or of A.R.S. § 1-201."

This riparian right has also been held by this Court to be a valuable property right protected by the Constitution of the United States in the case of *Hughes v. Washington, infra.*

The very purpose of the grant to the states of title to the beds of navigable streams, as stated by this Court in *Pollard, supra,* and the confirmation of such grant by the Submerged Lands Act was to provide in the sovereign the right to protect to the public the right to access to navigable streams by the ownership of the bed of the stream under the water. The state owns the land beneath a navigable stream as a servitude only and when the river is gone or destroyed either through natural or man-made causes, the reason for the servitude is gone and the limitation of servitude, if any remains, is to that channel remaining navigable or, as stated above, the main thread of the

navigable stream. (See statement above by Justice Lockwood; also analysis of decisions by Justice Lockwood immediately following the statement.)

No channelization was involved in *Claridge*. The Colorado River at the point involved in *Claridge* was flowing in a natural channel as stabilized by the construction and release of water from Hoover Dam. Therefore Arizona's ownership is limited to the east bank of the Colorado River as it now flows over and upon the Bonelli land in the man-made channel created by the Bureau of Reclamation under the rule stated in *Claridge* and the authorities cited above and in Justice Lockwood's dissent.

The question necessarily arises: Can a legitimate state governmental function be ascertained and supported by either a statute or judicial decision which allows the state to retain ownership to lands formerly submerged that have been permanently artificially restored to exposure to the extent that the lands not only can be used for agricultural purposes for the growing of crops but can be used for industrial and homesite development and are of no further significant value for navigation purposes? The answer clearly must be in the negative for the reason that there is no legitimate governmental function or duty associated with this claimed ownership for the benefit of the public as a whole to provide access to the waters of the newly established navigable stream, particularly when the exposed area could extend over a long distance from the banks of the newly created navigable stream.

This is the effect of the Arizona Supreme Court decisions. To ratify the rule as adopted by the Arizona Court would place the Federal government in the absurd position of channelizing the Colorado River (which it proposes to do, see Lundquist, Arizona Law Review, Pet. App. I, p. 315 and Brief of Amicus Curiae County Attorney of Mohave

County) and by this channelization it would provide the means of a grant of additional exposed land to Arizona. As a result the Federal government would have no access to the River except across State land (presumably with the permission of the State) and even then to the extent of possibly losing access to maintain the levees built for channelization of the River.

It is therefore respectfully submitted that the Federal government, having full power and authority under the commerce clause to change the flow pattern and the location of the Colorado River for its legitimate purposes (navigation and other), limits the State's ownership as originally intended for the purpose of sovereign control of access to the navigable stream to the bed of that stream as it exists after channelization and *title to the exposed dry bed of such river after channelization reverts back to the original owner,* be it an individual, the United States, an Indian tribe or the State itself.

II. Whether Changes in the Flow Pattern of a Navigable River Caused by the Construction of Dams and Rechannelization of the Stream Bed by the United States Changes or Alters the Ordinary High Water Mark for the Purposes of Changing or Altering the Ownership of the Exposed Lands Resulting from the Construction of Such Works.

The United States through its Bureau of Reclamation, without permission or consent from or by Bonelli or any express consent by the State, changed the channel of the Colorado River by relocating and rechanneling it in the latter part of 1959 and the early part of 1960. This caused an abandonment by the River of a large portion of the Bonelli land. (495 P. 2d at 1314; see also paragraph V, agreed statement, App. 8.)

The Arizona Supreme Court in its supplemental decision rejecting the *Claridge* decisions states:

"The subsequent artificial control of the river could not deprive Arizona of property rights in the bed which were constitutionally vested prior to the completion of the Hoover Dam in 1938 (*sic*) and the later rechannelization by dredging." (495 P. 2d at 1314.)

This rechannelization was done for the purpose of controlling the floods, improving navigation and regulating the flow of the Colorado River under the broad powers of the Boulder Canyon Act, 43 U. S. C. § 617. No part of the lands in question lie within the bed of the Colorado River from the thread of the river to its easterly bank. By accomplishing these purposes in the rechannelization work, the Bureau of Reclamation limited the main thread of the Colorado River to a man-made channel which in fact made the stream once again navigable at this point. There is absolutely no indication in the record or in the court decisions that at any time the Federal government in constructing Hoover Dam, Parker Dam, the channels mentioned in *Claridge* or the man-made channel at the point of the Bonelli land or at any other point in the Colorado River made these improvements which altered in some instances the course of the flow of the River for the purpose of changing ownership to the lands exposed by such works.

The Ninth Circuit Court of Appeals in *Beaver v. United States*, 350 F. 2d 4 (1965) (cert. denied 383 U. S. 937, 86 S. Ct. 1067, 15 L. Ed 2d 854 (1966) in which Arizona appeared as amicus curiae in support of the petition) states the general rule to be that unless man-made works were done on the Colorado River for the specific purpose of changing title to land, such works have no effect upon title.

In the case at bar it is clear that the water was suddenly removed from the Bonelli land by man-made avulsion through the rechannelization work by the Bureau of Reclamation and therefore the doctrine of re-emergence would

apply and limit Arizona's ownership to the east bank of the existing navigable river as shown by the "1962 Dependent Resurvey", p. 55 this brief, and *not* the old left bank of the Colorado River as shown on said survey for the reason there was no attempt made by the Bureau of Land Management to retrace and re-establish the boundaries of Section 3 (the Bonelli land) by the dependent resurvey, but the dependent resurvey was limited to retracing and re-establishing Sections 2 and 10.

As Judge Cameron held in his decision for the Court of Appeals (App. 39, 464 P. 2d at 1006) the doctrine of re-emergence of the Bonelli land should apply herein, citing *Philadelphia Co. v. Stimson*, 223 U. S. 605, 624, 32 S. Ct. 340, 56 L. Ed 570 (1912) and also *Beaver, supra*. Here in Bonelli we have no difficulty from the maps and plats of record and the aerial photographs in easily identifying the previous riparian land that Bonelli lost and which has re-emerged from the stream bed by reason of rechannelization.

Therefore Arizona's ownership to the bed of the navigable stream moved with the rechannelized main thread of the stream as changed by the construction works of the Federal government and its sovereign rights to control access for the benefit of the public to the bed of the rechannelized navigable stream remained. To hold otherwise, one must read into *Pollard, supra,* and the Submerged Lands Act a grant of land to the sovereign states never intended by this Court or by Congress to large areas of river bed thus exposed by such navigation works, which areas are not necessary for navigation or for public access to the navigable stream.

Mr. Lundquist in Arizona Law Review, Pet. App. I, page 329, refers to a dredging case decided by the Alabama court in *State v. Gill*, 259 Ala. 177, 66 So. 2d 141 (1953) and states this case:

"(I)s exemplary of third-party reclamation by dredging in the main channel and is remarkably similar to the *Bonelli* situation. In order to gain access to the dock of an ammunition dump, the United States Government dredged a channel in Mobile Bay and cast the dredged material along the shoreline, including the portion owned by the plaintiff. This strip of dredged land cut off plaintiff's access to the bay. He received no compensation and could not have successfully demanded it of the federal government. The Alabama court denied the state's claim to the new land, holding that the title was in the plaintiff as the upland owner. The court noted that although the federal government had the implied sanction of the state as owner of the bed to dredge the channel, that sanction was for the improvement of navigation and commerce, and not for the purpose of raising the bed above sea level."

and quotes from the Alabama court:

"It is obvious that we do not have in the case at bar an accretion by any slow or imperceptible processes. It has been suggested that the speeded up, artificial accretion, such as we have in the present case could well be called 'streamlined accretion' or perhaps a reclamation.

. . . [W]here there is what we have termed a streamlined accretion . . . title to such made-land is conferred upon the upland owner, subject only to the paramount rights of the United States and the State *in aid of navigation*. We understand that the title to the bed or bottom beneath navigable waters is in the state, but this is a title to the bed as a bed. . . . The state still owns the title to the bed beneath navigable water, but the made-land being added to the property of the riparian or littoral owner becomes his property.[22] [Emphasis added.]"

Mr. Lundquist concludes:

"Thus the navigational purpose rule was reaffirmed. The new land had no substantial connection with the

navigational project since navigation was not aided by placing the dredged material in front of this particular upland, and the new land was not needed as a part of the project." (Emphasis supplied.)

This principle, it is respectfully submitted, is the same conclusion reached by Judge Craig in *Claridge* and affirmed by the Ninth Circuit Court that the ordinary high water mark to which the extent of the State's ownership prevails *is within the existing banks of the Colorado River as re-channelized* (see "1962 Dependent Resurvey", p. 55 this brief) not only on the Arizona side of the River but also on the Nevada side where lies some forty acres of Bonelli land now exposed.

III. Whether Federal or State Law Controls the Ownership of Land Gained or Lost by Accretion on Property Conveyed by the United States Prior to Statehood.

This Court's decision in *Hughes v. Washington*, 389 U. S. 290, 19 L. Ed 2d 530, 88 S. Ct. 438 (1967), conclusively answers this question; that is, that Federal law controls the ownership of land gained or lost by accretion conveyed prior to statehood by the United States.

As was true in *Hughes*, Bonelli's predecessor in interest, the Santa Fe Railroad, acquired this land by virtue of a congressional grant two years before statehood and when the land was acquired, according to the plat of survey, the Colorado River was some distance west of the area now in question (see 1906 Official Plat of Survey, Exhibit B, App. 15; and also "composite plat", p. 54 this brief.)

We have before us a rule of ownership pronounced by our Federal courts in *Claridge* fixing the boundary of Arizona's ownership at one point and a rule by the Arizona Supreme Court fixing the State's ownership at another point, involving in the particular instance on the Bonelli

land an additional area in taking of the Bonelli land and extending into Federal land to the north, east and south. As stated by the Attorney General on page 5 of his response to petition:

> "The holding of the Court below is extremely different from the holding of the Court in United States v. Claridge, 279 F. Supp. 87, aff'd 9th Cir., 416 F. 2d 933 *where the identical questions involving lands adjacent to the Colorado River were presented for decision and the opposite result reached.* The Court there held that the 'ordinary high water mark' of the Colorado River is the point to which the waters usually reach today. That decision disregarded the changes in the 'natural river' as it existed prior to the closure of Hoover Dam and the 'stabilized river' as it exists today." (Emphasis supplied.)

If the *Claridge* rule is to be applied as limiting Arizona's ownership today to the east bank of the Colorado River as rechannelized, which we respectfully submit is the rule in *Claridge,* then we have a much greater portion of the Bonelli land revesting in Bonelli by virtue of re-emergence.

If this were not a boundary case where the boundary between Arizona and Nevada is fixed by compact to the center of the re-channelized stream, the Arizona rule could very easily cover lands between the two 500-foot contours as shown by the Davis Dam Quadrangle (Exhibit J), or a distance of approximately four to five miles in the area of the Bonelli land. On the other hand, the rule in *Claridge* before channelization but after the construction of Hoover Dam in 1935 would limit the area to about two-thirds of Section 3 (the Bonelli land) on both sides of the River as shown on the Davis Dam Quadrangle.

As stated by Justice Black in *Hughes, supra,* quoting from *Borax, Ltd. v. Los Angeles,* 296 U. S. 10, 80 L. Ed 9, 56 S. Ct. 23 (1935):

> "'(t)he question as to the extent of this federal grant, that is, as to the limit of the land conveyed, or the boundary between the upland and the tideland, is necessarily a federal question. It is a question which concerns the validity and effect of an act done by the United States; it involves the ascertainment of the essential basis of a right asserted under federal law." (19 L. Ed 2d 530 at 533.)

and concludes on page 534:

> "Any other rule would leave riparian owners continually in danger of losing the access to water which is often the most valuable feature of their property, and continually vulnerable to harassing litigation challenging the location of the original water lines."

Although *Hughes* involved tidelands and the gain of land by accretion by the patentee, the converse would be true if there was a loss of land by accretion. The rule clearly applies to a case where a state attempts to take away rights lost by accretive movement on a navigable stream and then is restored by the Federal government in the exercise of its legitimate control over navigable streams.

As stated by the Attorney General on page 7 of his response to petition and as shown by Pet. App. F and the Unofficial Land Status Map of the Lower Colorado River Area a part of the Report, *supra*, filed separately with the Clerk of this Court:

> "Throughout the length of the Colorado River along the western boundary of Arizona, thousands of acres of land are encompassed between these two 'high water marks' and title questions will continue to arise."

Unless we are to follow the Federal law as announced in *Claridge* by this Court reversing the rule in *Bonelli* adopted by the Arizona Supreme Court, there will be a constant state of confusion and chaos resulting from the

attempt to apply two different rules of law as to title and the boundaries fixed by the respective decisions. Such resulting confusion will not only affect existing land titles already vested but undoubtedly titles that will become vested or acquired in the future by grants from the United States, and only the Congress of the United States and the Legislature or people of Arizona by constitutional amendment *by joint action* could possibly permanently resolve the conflict between the two decisions as to the question of ownership.

IV. Whether the Decisions of the Arizona Supreme Court Affect Title to Federal and Indian Lands as Well as Private Lands Bordering the Colorado River.

As stated before, the Arizona Supreme Court's decision extended the ordinary high water line of State ownership in the immediate vicinity of the Bonelli land to portions of Sections 32 and 35, Township 20 North, Range 22 West, and Sections 2, 10 and 11, Township 19 North, Range 22 West to the east and south (which are fee and public lands) and over a large area of the Fort Mohave Indian Reservation to the south in unsurveyed Township 19 North, Range 22 West (Davis Dam Quadrangle, Exhibit J; 1960 Mosaic, Exhibit D, App. 6 et seq., and "composite plat", p. 54 this brief).

According to information furnished by the Bureau of Land Management (Pet. App. E, p. 1e, 2e, 3e) approximately 87 miles of 273 miles of shoreline in Arizona (or 32%) is owned and controlled by the Bureau of Reclamation and the Bureau of Land Management; approximately 71 miles (or 26%) is owned by the Federal government but under the control of the Bureau of Sports, Fisheries and Wildlife; and approximately 59 miles (or 22%) is within the exterior boundaries of Indian reservations. Without any breakdown,

it is shown that approximately 45 miles (or 16%) is owned by the State of Arizona and individuals. However it is agreed that by virtue of the Reclamation Withdrawal Order of January 13, 1903, and subsequent withdrawal orders, Arizona's ownership consists of a very small portion of the area although it is indicated otherwise on the maps hereinafter referred to. This is indicated by the Lower Colorado River Land Use Report, *supra*, where on page 14 thereof it is stated that approximately 15% of the riverfront lands in the Lower Colorado River Valley are in private ownership.

As a part of this Report there is contained three sheets entitled "Unofficial Land Status Map of the Lower Colorado River Area". On page 4 of the omitted memorandum of law in support of Bonelli's motion for rehearing before the Arizona Supreme Court (App. 55), reference is made to this Report and to an enlarged certified copy of these three map sheets dated March 1964, revised February 1969, April 1971 and July 1971, together with a colored copy thereof showing the fee and State land status along the immediate east bank of the Colorado River. These maps are before this Court on the record transmitted by the Clerk of the Arizona Supreme Court and Sheet 1 shows in black the Bonelli land (see Fig. 11, Pg. 54 of Report, *supra*). While these maps are not in all respects accurate as to land status, they are sufficiently accurate to show the approximate land ownership status of lands along the eastern bank of the Colorado River (see also Pet. App. F).

All lands in Arizona lying within six miles of the Colorado River west of the 114th Meridian were withdrawn by Executive Order of the Secretary of the Interior on January 13, 1903, issued pursuant to an Act of Congress June 17, 1902, 32 Stat. 388 (petition, p. 34; see also Judge Craig's findings in *Claridge*, 279 F. Supp. 87 at 90).

On the Arizona side of the Colorado River, there are two main Indian reservations, to-wit: The Mohave Indian Reservation which was formerly two old army forts established in 1870 and later transferred to the Indian Service for the benefit of the Fort Mohave Indians by executive order, which is located immediately adjacent on the south to Section 10 (public land) and Section 10 is immediately adjacent on the south to the Bonelli land as shown on the plats of record and the "1962 Dependent Resurvey"; and the Colorado Indian Reservation which is located in Yuma County, Arizona, between Parker and Ehrenberg.

Arizona's Enabling Act (p. 8 this brief) specifically required as a condition to statehood that the people of Arizona disclaim all right, title and claim to unappropriated and ungranted public lands within the Territory and to all lands lying within the Territory owned or held by any Indian or Indian tribes. The people in conformity to this mandate from Congress did in Article XX, Section Fourth, of the Ordinance provision of the Constitution disclaim forever all right, title and claim to said public and Indian lands (p. 8 this brief).

Notwithstanding these prohibitions by Congress and disclaimers by the people of Arizona, the Arizona Supreme Court in *Morgan v. Colorado River Indian Tribe*, 103 Ariz. 425, 443 P. 2d 421 (1968), (a case involving personal injury occurring on the Colorado River within the exterior boundaries of the Colorado River Indian Reservation) held that the State held the title and control of the submerged lands and navigable waters of the Colorado River as it ran through the Reservation. In question in this case was the construction and interpretation of the Executive Order of May 15, 1876, establishing the Reservation. The Supreme Court found:

> "Even though President Grant could have reserved the beds and waters to the Colorado River Indian Tribe, his order of 1876 lacked the 'clear intention' necessary to make such a conveyance. (Citing cases.) There has been no 'peculiar need' shown in this case which would infer Executive Intent that submerged lands and navigable waters be included in the grant of May 15, 1876."

and concluded at 423:

> "We therefore hold that the State of Arizona holds title and control over the submerged lands and navigable waters where the accident occurred."

We have been unable to obtain clear, readable and concise copies of the numerous withdrawal orders relating to the Fort Mohave Indian Reservation. In the language of the Arizona Supreme Court in *Morgan* unless these Executive Withdrawal Orders reserved the bed underneath the waters of the Colorado River as it flowed through the Fort Mohave Indian Reservation to the Indian tribe, title and control of the submerged lands under the navigable waters of the Colorado River vested in Arizona upon statehood and as the River moved eastward (see Davis Dam Quadrangle, Exhibit J; 1960 Mosaic) title to the bed vested in Arizona with the movement of the River. Under the *Bonelli* decisions it is clear this title extended to the high water mark defined in *Bonelli* and that title to the exposed land after rechannelization remained in Arizona, as it did in *Bonelli*, and was never revested in the Indian tribe.

If the *Bonnelli* and *Morgan* decisions are correct and upheld as a matter of law we can see no difference in the impact of these decisions on the Bonelli and other fee land, the Indian land and the public land lying along the full course of the Colorado River as it flows below Hoover Dam, based upon Arizona's interpretation of the grant to states as announced by this Court in *Pollard, supra,* and later confirmed or quit-claimed by the Submerged Lands Act.

It must follow therefore that the same rule adopted in *Bonelli* by the Arizona Supreme Court relating to fee lands, the source of title of which came from the United States, would apply as well under the grant at statehood also to Indian lands and to all other types of public lands owned by the United States notwithstanding any provision of the Enabling Act, the Constitution of Arizona or Executive Withdrawal Orders to the contrary.

V. Whether the Latter Decision of the Arizona Supreme Court Dated April 13, 1972, Misconstrues or Misinterprets the Submerged Lands Act of Congress as a Grant by Congress to the States of Lands Formerly Beneath Navigable Waters Up to the Ordinary High Water Mark Without Recognizing That Said Act Specifically Exempts from the Effect Thereof Any Lands to Which Title to the Beds of Such Streams Was Lawfully Patented or Conveyed by the United States or Any State to Any Person (43 U. S. C. 1301(f)).

The majority supplemental decision of the Arizona Supreme Court of April 13, 1972, places great reliance as authority for the first decision of October 4, 1971, as well as in support of the supplemental decision, the fact that the Submerged Lands Act not only quit-claimed but made an additional grant of submerged lands not originally granted by this Court in *Pollard, supra.* The majority opinion, however, does not qualify the Court's interpretation of the Submerged Lands Act by the exception stated therein in Section 1313(a) of the Act, which reads in part:

> "(a) • • • all lands expressly retained by or ceded to the United States when the State entered the Union • • •". (C. 65, Title II, § 5, 67 Stat. 32, 43 U.S.C. § 1313.)

or Section 1311(a) of the Act which reads in part:

> "(a) • • • or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective

grantees, lessees, or successors in interest thereof;". (C. 65, Title II, § 3, 67 Stat. 30, 43 U. S. C. § 1311.)

or the exceptions under "definitions" in Section 1301(f) exempting from the Act title to the beds of such streams lawfully patented or conveyed by the United States or any State to any person (C. 65, Title I, § 2, 67 Stat. 29, 43 U. S. C. § 1301(f)).

It clearly appears from the history of Arizona law that on June 5, 1950, Bonelli was the record owner of the land in question subject only to whatever rights Arizona might have acquired to the bed of the main thread of the Colorado River by its movement from west to east. The Davis Dam Quadrangle, Exhibit J, also clearly indicates that in 1950 title to a substantial portion of the Bonelli land would remain vested in Bonelli, particularly in the southeast corner and islands existing in the River for the reason that Arizona at that time had no statutory or judicial made law to the contrary.

We further submit that it was never intended by this Court in its land-mark decision of *Pollard, supra,* or the intent of Congress by the enactment of the Submerged Lands Act to grant to the states as they were admitted to the Union any title to the beds of navigable streams of any area not required for the states to hold in trust for the public in order to provide the public access to the navigable stream. Clearly it was never intended that this grant to the states would provide the vehicle for a state to gain title to large areas formerly covered by the waters of a navigable stream to use for purposes other than navigation or to vest title in the states of these exposed areas in a proprietary rather than sovereign capacity.

The Arizona Supreme Court also completely ignored the other exception contained in Section 1301(f) of the Act,

supra, for it is possible that upon conveyance by the United States to Santa Fe a portion of the land was underlying the Colorado River and as the River moved in a slow and imperceptible manner to the east Santa Fe's title and later Bonelli's title followed the movement of the River.

VI. Whether the Respective Decisions of the Arizona Supreme Court Constitute a Taking of Property by the State of Arizona Without Compensation Having Been Made Therefor in Violation of the Fifth and Fourteenth Amendments to the Constitution of the United States and the Provisions of Article 2, Section 17, Arizona Constitution.

Justice Struckmeyer speaking for the majority in the supplemental *Bonelli* decision of April 13, 1972, brushed off the contentions of amici curiae on rehearing that the first *Bonelli* decision would have a disastrous affect upon the ownership of lands and improvements along the Colorado River in the following language:

> "Appellee Bonelli and others who have appeared as amici curiae have principally advanced economic reasons for rehearing our decision in State v. Bonelli Cattle Company, 107 Ariz. 465, 489 P. 2d 699 (1971). Such are more properly matters of legislative consideration than the concern of a court whose responsibility is to adhere to the law as it finds it so that rights will not depend on the personal idiosyncracies of its members or hang in suspense when economic considerations change." (495 P. 2d 1312 at 1313.)[1]

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1. Undoubtedly Justice Struckmeyer in speaking of the personal idiosyncracies of members of the Court had in mind the position the Arizona Supreme Court found itself in the *Bristor v. Cheatham* cases wherein in the first decision, 73 Ariz. 228, 240 P. 2d 185 (1952), the members of the Court by a split decision held that percolating or ground waters were subject to appropriation in Arizona the same as surface waters. In 1953, after a change of membership in the Court, the Supreme Court reversed this decision, 75 Ariz. 227, 255 P. 2d 173, and upheld the long-time rule of property that percolating or ground waters were not sub-

As shown by the maps of record and the statistical data furnished by the Bureau of Land Management (Argument IV, *supra*) hundreds if not thousands of acres of fee land along the Colorado River are affected by the Arizona Supreme Court's decisions. It is stated on page 14 of the Lower Colorado River Land Use Report, *supra:*

> "Approximately *15 percent of the riverfront lands* in the Lower Colorado River Valley are in private ownership. These lands are, for the large part, irrigated agriculture lands and residential areas. A very small portion of the private lands is devoted to recreation purposes. Those private lands which are used for recreation resorts are in key or favorable positions on the river. As recreation needs increase, more use of private lands to provide commercial resorts and residential sites is anticipated." (Emphasis supplied.)

In Yuma County as stated by Justice Lockwood in her dissenting opinion, the importance of argicultural developments bordering the Colorado River is of great significance (489 P. 2d 699 at 706). The Report, *supra*, under the heading "Agriculture" states on page 17:

> "Large sections of the Lower Colorado River *bottom lands* and some adjacent mesas support intense irrigation farming. Such high value specialty crops as cotton, winter vegetables and citrus fruits, as well as staple crops and feed, are produced. Growing conditions and particularly climatic conditions are well adapted to crop production under irrigation and productivity is generally high. *The annual economic benefit to the Valley is estimated at approximately $80 million.*
>
> "Approximately 250,000 acres or 60 percent of the arable lands along the Lower Colorado River *are irrigated.* * * *". (Emphasis supplied.)

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ject to appropriation but belonged to the owners of the land. In other words, a change of membership in the Arizona Supreme Court since the *Bonelli* decisions could cause a complete reversal or modification of the previous *Bonelli* decisions and leave titles in a greater state or confusion.

In Mohave County, however, hundreds of acres along the Colorado River have been converted into valuable subdivision property and the value of the property, as well as the improvements thereon, will run into millions of dollars (see Amicus Curiae Brief of Mohave County Attorney and Amicus Curiae Brief of Land Owners in Section 15 before the Supreme Court on rehearing and Exhibit B attached to the latter brief, being an aerial photo dated June 28, 1970, of the subdivision known as Bermuda Plantations). The Report *supra,* (dated 1964) refers to Bullhead City, an area which is a short distance north of the Bonelli land, in the following manner on page 18:

> "Bullhead City is a 300-acre town of some 500 permanent residents. Its economy is centered around the recreational activities along a 15 mile stretch of the Colorado River above and below Davis Dam. As recreational activity increases, the town will grow, mainly to the south and east, South of Bullhead City residential subdivision activity has been increasing."

The 1970 census shows Bullhead City to have a population of 3200.

The owners of the fee land and improvements thereon along the Colorado River in Yuma and Mohave Counties have now been informed by the Arizona Supreme Court in the *Bonelli* decisions that title to their lands and improvements is vested in the State of Arizona. Justice Lockwood states in her dissenting opinion in the first decision (489 P. 2d 699 at 707) that the decision of the majority constitutes a taking by the State of private property and the improvements thereon without just compensation, and again states in her dissenting opinion to the supplemental decision of the majority:

> "(2) The decision violates the provisions of Article 2, § 17, Arizona Constitution, A. R. S., in that the result, i. e., permitting the state to acquire without compensa-

tion large quantities of property from private owners, constitutes a taking of the land for public use without just compensation having been made therefor." (495 P. 2d 1312 at 1315.)

The *Bonelli* decisions insofar as they affect and apply to other fee lands along the Colorado River definitely violates the provisions of Article 2, Section 4, of the Arizona Constitution, which reads as follows:

> "No person shall be deprived of life, liberty, or property without due process of law." A. R. S., Vol. I, Arizona Constitution.

for the reason that the taking of these fee lands by the *Bonelli* decisions has been accomplished by judicial fiat without due process.

Likewise the taking by the two *Bonelli* decisions of the Bonelli land and fatally clouding the titles (which is in effect a taking) of other fee lands and improvements along the Colorado River owned by other persons constitutes a direct violation of the Fifth and Fourteenth Amendments to the Constitution of the United States. The owners of the fee lands along the Colorado River (since prior to statehood in some instances such as the Santa Fe, now Bonelli land) have relied, which they had every right to do, upon the fact that their lands had not been invaded by the State of Arizona through the movements of the Colorado River because neither the Legislature nor the people of Arizona had ever legislated upon the subject matter as other states have nor had the State through its agencies ever asserted title to the lands gained by the movement of the Colorado River nor had the courts by judicial fiat in effect legislated on the subject matter and declared the extent of the State's ownership.

We have the exact situation at hand herein that Justice Stewart in his separate concurring opinion in *Hughes v. Washington, supra,* covers in the following language:

> "But to the extent that it constitutes a sudden change in state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate. For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law *by the simple device of asserting retroactively that the property it has taken never existed at all.* Whether the decision here worked an unpredictable change in state law thus inevitably presents a federal question for the determination of this Court. * * * ". (19 L. Ed 2d 530 at 535, 536.)

and concludes on page 536:

> "As is so often the case when a State exercises its power to make law, or to regulate, or to pursue a public project, pre-existing property interests were impaired here without any calculated decision to deprive anyone of what he once owned. But the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it *does.* Although the State in this case made no attempt to take the accreted lands by eminent domain, it achieved the same result by effecting a retroactive transformation of private into public property—without paying for the privilege of doing so. Because the Due Process Clause of the Fourteenth Amendment forbids such confiscation by a State, *no less through its courts than through its legislature, and no less when a taking is unintended than when it is deliberate,* I join in reversing the judgment." (Emphasis supplied.)

It is therefore clear that the legislative decisions of the Arizona Supreme Court retroactively applying a rule of property constitutes a taking of property by the State without due process and is a taking without payment of any compensation whatsoever for any lands that might lie

between the high water mark established by the Arizona Supreme Court in *Bonelli* and the center of the Colorado River as it now exists.

The record before the Supreme Court of Arizona on rehearing will disclose that at least as far back as 1925 the executive department of Arizona has been advised as to possible ownership by the State of lands along the Colorado River and also from time to time since then the Attorney General has advised the legislative department, at the request of the Legislature, the need for legislation (see also pages 3, 4, Attorney General's response to petition). But not until the advent of the *Claridge* case (and even then it was after the action had been commenced in the United States District Court) did Arizona ever assert ownership over the exposed beds of the Colorado River by leasing the land so exposed to Claridge. However under the *Claridge* decisions the State's claim and right to lease was declared to be without merit and void.

Now for the first time in the history of Arizona the Arizona Supreme Court by judicial fiat has taken the initiative and legislated on the subject matter. As stated by Justice Lockwood again in her dissenting opinion:

> "The question here involved is one of first impression, and one on which our legislature has never spoken through its statutory powers." (489 P. 2d 699 at 706.)

In the meantime millions of dollars have been invested by persons holding fee title in the development of exposed lands along the Colorado River.

While the doctrine of sovereign estoppel was properly raised before the Supreme Court of Arizona on rehearing (see paragraph III, Motion for Rehearing, App. 55, 56), the Court ignored the doctrine in its supplemental decision of April 13, 1972. Due to the misinterpretation of Supreme

Court Rule 46 that a joint petition for writ of certiorari could be filed by Arizona, Bonelli and Mohave County, in the preparation of questions raised in the petition in deference to the wishes of the Attorney General the question of sovereign estoppel was omitted; otherwise the question would have been presented because of its over all importance relating to titles along the Colorado River. However we now believe that it is of major concern and can be properly raised herein under this question.

It is respectfully submitted and urged that if there ever was a time and a factual situation when the Court should adopt and apply the doctrine of equitable estoppel to the sovereign, such time has arrived in the case at bar.

While in the past it has been held that the doctrine of estoppel does not apply to Arizona any more than the statute of limitations would apply *Kerby v. State ex rel. Frohmiller,* 62 Ariz. 297, 157 P. 2d 698 (1945), it appears to be the rule that this prohibition applies only to where the questions arise as to the preservation of public property and not where the state would assume to claim ownership of lands to which it had no record title either by grants from the United States or from individuals through deed or condemnation.

In the Attorney General's reply brief before the Arizona Court of Appeals an excellent opinion was furnished the court entitled "Memorandum of Law Points and Authorities Respecting the Rights of Arizona in the Colorado River" which was prepared and submitted to the Honorable George W. P. Hunt, Governor of Arizona, by Samuel White, Attorney at Law, under date of September 8, 1925. Arizona's asserted claim of ownership to lands along the Colorado River was therefore (if not previously) brought clearly to the attention of the executive department of Arizona. It is

clear the legislative department never saw fit to legislate along the lines of claimed ownership set forth in this Memorandum.

In 1935 the Attorney General at the request of the State Land Commissioner wrote an opinion in which it was held that Arizona did have certain title to the lands along the Colorado River and the State Land Department would have the authority under law to lease these lands subject to the limitations that the leases would not interfere with the powers of Congress to regulate commerce and navigation upon the Colorado River.

In the Attorney General's Reports of 1963, 1964 and 1967 attached as Exhibits B-1, B-2 and B-3 to Bonelli's motion for rehearing by the Arizona Supreme Court, the executive department as well as the legislative department of Arizona was informed that Arizona had certain rights to land along the Colorado River but that certain legislation was required to satisfy the conflict in titles (see statement by the Attorney General pp. 3, 4, response to petition for a writ of certiorari). It appears that the State Land Department of Arizona, under its authority to administer State lands (which would include all lands owned by Arizona along the Colorado River) never saw fit to exercise Arizona's claim of ownership until after the *Claridge* action had been commenced in the United States District Court.

Of course when the Bonelli action was filed in the Superior Court of Mohave County in 1962 (App. 3) Arizona did assert ownership to the Bonelli lands, but until such time (or long after 1925 and 1935) Arizona never made any real attempt to assert its title to any lands along the Colorado River. In other words Arizona has sat back, notwithstanding advice to the contrary, and allowed people whose title on lands adjacent to the Colorado River was derived from patents issued by the United States to develop

the lands either for agricultural, recreational or subdivision purposes and by the State's inaction it has lulled these title owners into a false sense of security and allowed them to proceed to develop and improve their lands at great expense and outlay of money without notice of the State's claim of ownership. Clearly the doctrine of equitable estoppel should apply and run against the State of Arizona.

The Ninth Circuit Court of Appeals in *United States v. Georgia-Pacific Company*, 421 F. 2d 92 (1970), held that the doctrine of estoppel does apply in certain instances to the government, particularly where the question involved is not that of preserving public lands but is an attempt to gain new title to lands. The Court also held that a party's silence will work an estoppel if, under the circumstances, he has the duty to speak (page 97) and this last statement is exactly what has happened in the case at bar. The Court further states on page 99:

> "Such governmental immunity from estoppel is an offshoot of sovereign immunity."

The Arizona Supreme Court in *Stone v. Arizona Highway Commission*, 93 Ariz. 384, 381 P. 2d 107 (1963; rehearing denied), abrogates and reverses the rule of governmental immunity from tort liability in the following language on page 109:

> "We are of the opinion that when the reason for a certain rule no longer exists, the rule itself should be abandoned. After a thorough re-examination of *the rule of governmental immunity from tort liability, we now hold that it must be discarded as a rule of law in Arizona and all prior decisions to the contrary are hereby overruled.*" (Emphasis supplied.)

The same reasons that the Court gave in its decision for the abrogation of governmental immunity from tort liability, *supra*, therefore gives rise to the reason for the abrogation

of the rule of governmental immunity from the application of the rule of doctrine of equitable estoppel, particularly when the action is in equity, as it is in *Bonelli*, for it has also been held by the Arizona Supreme Court in *State v. Martin*, 59 Ariz. 438, 130 P. 2d 48 (1942) at 52:

> "This is an equitable action, and in equitable matters, in the absence of some statutory or constitutional provision to the contrary, *the general principles of equity should be applied to actions brought by the state as well as by a private party.*" (Emphasis supplied.)

And, more particularly, where there is an attempt by the State to gain new titles to lands and not protect public lands which it already owns by congressional grants under the Enabling Act or by deed.

It is respectfully submitted that it was the duty of the executive and legislative departments of Arizona to speak out by legislation or administrative action to claim and assert title to lands along the Colorado River and not wait until the record owners had expended large sums of money in the development and improvement of the lands. While it is admitted that the Bonelli land is not improved, yet it must be assumed that since Bonelli obtained title to the land it has paid state, county and school district taxes as fee owners and now the land (which at one time might have been considered worthless) is in the center of a highly developed recreational and subdivision area and therefore has become very valuable as shown by the whole record before the Court. Clearly, therefore, the doctrine of equitable estoppel should apply and be enforced against the State of Arizona.

It must be remembered we are not only dealing with Bonelli herein who has had its day in court, but there are involved numerous other owners of fee land along the

Colorado River many of whose source of title was acquired from and warranted by the Santa Fe Railroad, as well as the rights of lending agencies (both government and private) who have loaned large sums of money in development and improvement of land along the Colorado River, title insurance companies who have insured title guaranteeing these loans and title to these lands and a large tax base for Yuma and Mohave Counties, all of which rights have been swept under the rug by the two *Bonelli* decisions. These rights are substantial rights and this Court should not only bar the State of Arizona from asserting title to the same but should insist that if it does attempt to assert title to the land and improvements that it can do so only by affording these title owners their day in court and compensate them for the taking.

For these reasons alone we respectfully urge this Court (1) to invoke the doctrine of equitable estoppel against the State of Arizona and/or (2) to declare the decisions of the Arizona Supreme Court null and void as an attempt to retroactively confiscate the property of Bonelli and others without due process and without just compensation.

CONCLUSION

Although counsel of record undoubtedly will disagree as to the proper rule of law sought to be obtained from this Court, they will however unanimously agree that the questions presented herein relating to the change of ownership along the Colorado River resulting from the movement of the River from time to time and the works performed by the Federal government in the exercise of its powers under the commerce clause present one of the most important issues that has ever been before the courts of Arizona or this Court relating to land titles in Arizona. The confusion of land titles and the clouds placed thereon by the *Bonelli*

decisions and the resulting doubts as to the extent of public and Indian land ownership along the Colorado River as it flows through Arizona is without parallel in Arizona history. We are not only concerned with what has happened to the change of ownership as a result of the movement of the Colorado River and works performed by the Federal government in the past, but we are also concerned with the possible change of ownership resulting from works, particularly future channelization, on the Colorado River by the Federal government.

The broad questions presented herein not only affect titles to lands along the Colorado River but could affect titles to lands along all navigable streams in the nation where the channel of navigable streams has been changed by the Federal government in the exercise of powers under the commerce clause for reclamation, flood control, conservation, environmental and ecological reasons. It is a well-known fact that the Federal government through either its Corps of Engineers or Bureau of Reclamation is constantly exercising its rights and powers by constructing works to preserve and improve these navigable streams. Ownership established in the past by old types of works, such as levees, channels and dams, due to the passage of time have undoubtedly been stabilized; but what will the new works do in the future and what would they do under the *Bonelli* rule in the way of changing ownership and title? Regardless of the conclusion reached by this Court on this important question, its decision will have a direct impact on lands bordering other navigable stream systems throughout the nation.

The Arizona Supreme Court by the *Bonelli* decisions leaves it entirely up to conjecture and prophecy as to who is to determine the boundary lines fixed by the Court and by what means such boundary lines are to be determined.

The *Bonelli* decisions have, in effect, opened a wide corridor of state-owned land from at least Davis Dam in Mohave County down to the Mexican border south of Yuma. This wide corridor of state-owned land fixed by *Bonelli* has separated the Colorado River from former riparian land whether it be fee, Federal or Indian land and has, in effect, placed the Federal government in the ridiculous position of finding itself, as a result of its channelization works, without access to the River except across State land. Again it cannot be overemphasized that there is a complete lack of legitimate government function associated with this claimed ownership which, as pronounced in *Bonelli*, covers large areas of exposed land far away from the main thread of the Colorado River wholly unnecessary to provide for the public benefit and use access to the main channel of the navigable stream. Such conclusions reached by the Court in *Bonelli* emasculates the decisions of this Court and the intent of Congress in the enactment of the Submerged Lands Act, *supra*.

After almost fifty years of being advised by its legal departments of state of possible ownership to the lands bordering the Colorado River, Arizona—"the sleeping giant"—has suddenly awakened and now claims through the means of retroactive judicial legislation ownership of the land after it has been successfully and expensively developed by the owners thereof, without offering to compensate the owners for the taking thereof; and possibly also extending its claimed ownership to public and Indian lands bordering the Colorado River. As stated by Lundquist in his Conclusion (Arizona Law Review, Pet. App. I, page 342):

> "The problems faced by the *Bonelli* court were formidable and deserved more written explication than they received. The holding regarding post-Hoover Dam accretions and the definition of the high water mark

must be reconsidered either by the Supreme Court of Arizona or, in the case of lands vested in or *derived from* the federal government, by the federal courts. Allowing the 1938 (*sic,* 1935) high water mark to delineate the boundary between the state-owned bed and the uplands does violence to the accretion doctrine and hundreds of years of common law. Practically, the decision will cause confusion and hardship among landholders within Arizona along the Colorado River. Because the lands involved in *Bonelli* had previously been held by the upland owner and were then lost to the river by erosion, re-exposure of the lost acreage should result in an award to the upland owner by the doctrine of re-emergence. The cause of the re-exposure should be of no effect." (Lundquist emphasis.)

For the foregoing reasons, it is respectfully submitted that the two *Bonelli* decisions by the Arizona Supreme Court should be reversed and set aside and the Arizona Court of Appeals decision and the trial court's judgment affirmed, and this Court should hold that Arizona's title to the bed beneath the navigable stream of the Colorado River extends only to the banks of the main or navigable thread of the Colorado River, whether it be man-made or natural.

Respectfully submitted,

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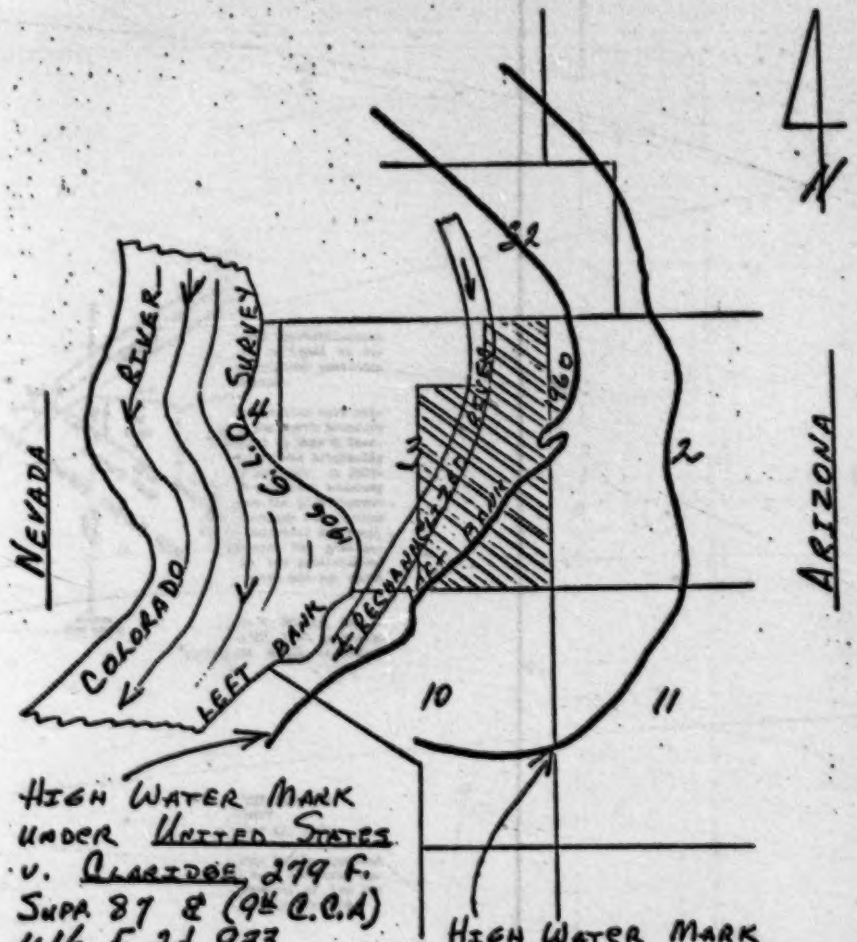
County of Mohave

SUBJECT LAND -- PART OF SECTION 3, T. 19N., R. 22 W., G. & S. R.B. M.

▨ — SUBJECT LAND

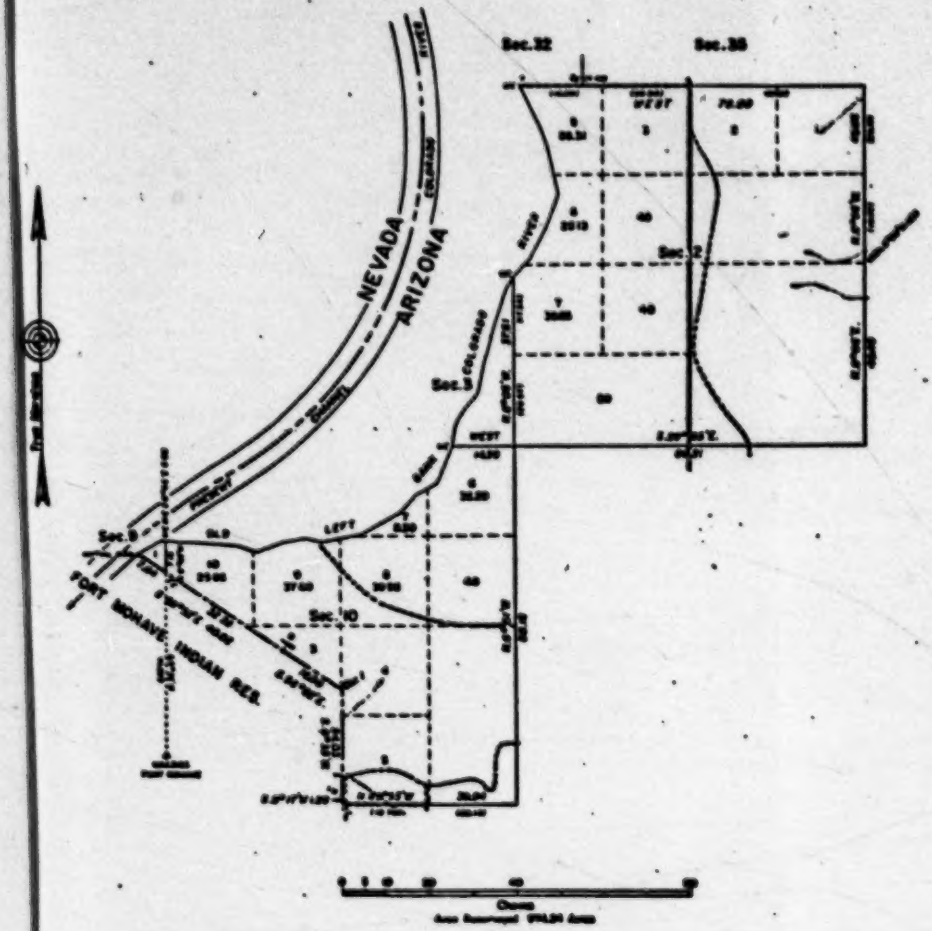


HIGH WATER MARK UNDER UNITED STATES v. CLARIDGE, 279 F. SUPP 87 & (9TH C.C.A) 416 F. 2d 983

HIGH WATER MARK UNDER ARIZONA v. BONELLI CATTLE COMPANY, 495 P. 2d 1312

TOWNSHIP 19 NORTH, RANGE 22 WEST OF THE GILA AND SALT RIVER MERIDIAN, ARIZONA.

LIMITED DEPENDENT RESURVEY



This plat represents a retracement and reestablishment of the boundaries of secs. 2 and 10, designed to restore the corners thereof to their original positions according to the best available evidence.

The boundaries of the Ft. Mohave Reservation were originally surveyed by Army Engineers. The north boundary of the township was initially surveyed by Omar E. Cone, Deputy Surveyor, in 1872. The township was originally subdivided by J. J. Fisher, Deputy Surveyor, in 1905-06, including the resurvey of the reservation boundary and the north boundary, as shown upon the plat approved June 29, 1906. The reservation boundary was further resurveyed by Sidney H. Blout, U.S. Cadastral Engineer, under Group 149, Arizona, as shown upon the plat accepted January 23, 1931. Except as new subdivisions are shown hereon, the lottings and areas are as shown upon the township plat.

These surveys were executed by Elden V. Sibley, Cadastral Surveyor, from December 12 to 22, 1961, pursuant to supplemental special instructions dated September 15, 1961, for Group 355, Arizona.

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
Washington, D.C. October 12, 1962

This plat is strictly conformable to the approved field notes, and the survey, having been correctly executed in accordance with the requirements of law and the regulations of this Bureau, is hereby accepted.

For the Director

Chief, Division of Engineering

55